Federal Court  Cour fédérale

Date: 20171122

Docket: T-1110-15

Citation: 2017 FC 1057

Toronto, Ontario, November 22, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

TOKMAKJIAN INC.

Applicant

and

EMPLOYEES LISTED IN SCHEDULE "A"
ED ACHORN

Respondents

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JUDGMENT AND REASONS

[1] This is an application for judicial review [Application] of the decision of a referee [Referee] appointed under section 251.12 of the *Canada Labour Code*, RSC, 1985, c L-2 [*Code*] finding that the Respondents were federally regulated for labour relations purposes.

[2] The Applicant, Tokmakjian Inc. [Tokmakjian], is based in Vaughn, Ontario and provides interprovincial charter and coach bus services. Until 2010, Tokmakjian also provided municipal transit services in York Region, Ontario. These two divisions operated as "Can-Ar Coach" [Coach] and "Can-Ar Transit Services" [Transit], respectively.

[3] The Respondents are former Transit employees [Transit Employees]. When the contract between Tokmakjian and York Region ended in July 2010, so did the Transit Employees' employment. After termination, the Transit Employees filed a complaint under the *Code* for severance pay. An inspector ordered payment, and Tokmakjian appealed, arguing that the Transit Employees were not entitled to severance under the *Code* because they were governed by provincial rather than federal labour laws. The hearing of the appeal took place over four days between November 2013 and February 2014. On June 1, 2015, the Referee rendered her decision, concluding that the Transit Employees fell under federal jurisdiction for labour law purposes [Decision].

[4] I have considered the matter within this complex area of law, and concluded that the Referee erred: it is my view that the Transit Employees indeed fell under provincial jurisdiction.

I. Background

[5] Tokmakjian began under the name "SN Diesel Service" in about 1971, servicing and repairing diesel engines [Diesel]. About ten years later, Tokmakjian bought a charter bus service, which it operated as Coach, starting out with only three buses. Around 1985, the City of Vaughan asked Tokmakjian to run its municipal bus service. Meanwhile, Coach had grown to 40 buses.

[6] Tokmakjian's full-time Transit drivers were initially represented by the Can-Ar Transit Operators' Association, which merged in 1995 with the Amalgamated Transit Union, Local 1587 [Local 1587], and then applied for a declaration that it had acquired its predecessor's rights, privileges, and duties. The issue of jurisdiction was raised on the application before the Canada Labour Relations Board [CLRB]. At that time, Tokmakjian had one location (in Vaughan), one operations manager that oversaw both Coach and Transit employees, a central management team, and a single dispatch office. In addition to its 40 Coach buses, Tokmakjian also had 12 Transit buses.

[7] The CLRB's decision ((7 November 1995), Toronto 580-280, 1482 (CLRB) at 4 [the 1995 CLRB Decision]) contained a constitutional analysis consisting of a single paragraph, stating that the CLRB had considered "such elements as the existence of a single reporting facility, common employee manuals, and the centralization of employee dispatch, of vehicle service, and of decision making with respect to labour relations". Based on these considerations, and citing no authority, the CLRB found that Transit was "not severable" from Tokmakjian's

interprovincial transportation business. The CLRB then concluded that Tokmakjian was a federal undertaking for the purposes of the *Code*, relying on *Charterways Transportation Ltd*, 1993 CanLII 7922 (OLRB) [*Charterways*]. Thus, the CLRB found that Transit's labour relations came within federal jurisdiction.

[8] In 2002, Tokmakjian moved its Coach operations to Mississauga (Transit and Diesel stayed in Vaughan), hiring a separate operations manager for Coach, and dividing its dispatch. Tokmakjian also introduced different software and payroll systems for Coach and Transit.

[9] In 2003, the Employment Equity Office of Human Resources Development Canada [HRDC] instructed Tokmakjian to comply with federal employment equity requirements. Because of Coach's move to Mississauga, Tokmakjian requested a ruling on whether all its operations remained under federal jurisdiction (at that time, Tokmakjian had two main divisions, Diesel and Coach, the latter of which was divided into "Can-Ar Highway Coach" and "Vaughan Transit").

[10] In the resulting HRDC decision, the inspector determined — based on information provided by Tokmakjian — that Diesel and "Vaughan Transit" both fell under provincial jurisdiction, whereas "Can-Ar Highway Coach" fell within federal jurisdiction due to its extra-provincial transportation services [the 2003 HRDC Decision]. It is noteworthy that the inspector who authored the 2003 HRDC Decision was the same inspector who prepared the report relied upon by the CLRB in issuing the 1995 CLRB Decision.

[11] After September 11, 2001, the amount of interprovincial and international travel by Coach decreased drastically: ultimately, Coach was downsized later in 2003 and moved back to Vaughan. A few years later, in 2006, Tokmakjian was awarded a major contract to operate municipal transportation for York Region Transit, which it did for the next four years.

[12] In early 2010, after Tokmakjian learned it was losing its contract with York Region, Local 1587 was granted decertification on an application to the Canada Industrial Relations Board [CIRB] (previously the CLRB). The issue of jurisdiction was not considered.

[13] Shortly afterwards, Amalgamated Transit Union, Local 113 [Local 113] applied to the Ontario Labour Relations Board [OLRB] for certification to represent the Transit Employees. Tokmakjian opposed the certification on the basis that all its operations were federally regulated. The matter was not resolved prior to the end of July 2010, when Tokmakjian's contract with York Region ended and the contract was awarded to another company, Veolia Transportation Services (Canada) Inc. [Veolia]. Local 113 then obtained provincial certification to represent Veolia's transit employees, who were largely individuals previously employed in Tokmakjian's Transit division.

[14] Following the termination of their employment, the Transit Employees filed a complaint seeking severance pay under section 235 of the *Code*. After an order was issued for payment, Tokmakjian brought a wage recovery appeal under Part III of the *Code*, arguing that its Transit operations fell under provincial jurisdiction. The Decision resolving that appeal is now the subject of this Application.

[15] The Transit Employees affected by the appeal fall into three groups: (i) 145 drivers covered by a collective agreement, (ii) 19 mobility drivers covered by a different collective agreement and represented by a different union, and (iii) seven management employees. All these employees were hired by Veolia after the termination of their employment with Tokmakjian; no employee lost any work time as a result of the change of contract.

II. Decision under Review

A. *Factual context*

[16] The Referee found that, as of July 31, 2010, Coach and Transit employees worked out of the same location in Vaughan. This meant sharing the same workplace facilities (including breakroom, washrooms, and the parking lot), and using the same third-party payroll provider.

[17] The Referee also found that the two divisions had different managers, dispatchers, dispatch systems, and payroll accounts. Tokmakjian gave evidence that the terms and conditions of Coach and Transit employees' employment were also different, as was the management of the two divisions. The Referee found that Coach's 45 workers — which included non-unionized employees drivers and independent contractors — and Transit's 245 unionized employees had different managers. It was also a condition of Tokmakjian's contract with York Region that the company would adhere to Ontario's health and safety and human rights legislation when managing Transit employees.

[18] The Referee found that drivers for both Coach and Transit were required to have the same class of license. Tokmakjian's evidence was that Coach driving was regulated by provincial law and Transit driving was regulated by the Transit Employees' collective agreement.

[19] Coach and Transit used different buses. Different rates of pay applied for Transit and Coach driving. Tokmakjian's evidence was that Transit driving was considered more complex and, as such, required more detailed training than Coach, being heavily guided by Tokmakjian's contract with York Region. While the same individuals provided training to both Coach and Transit employees, the training itself differed (including the use of different training manuals), although there was also some evidence before the Referee that Coach and Transit drivers received the same customer service training.

[20] While the factual record before the Referee was largely undisputed (the parties simply disagreed on its constitutional implications), one contested fact was the percentage of the Transit Employees' payroll generated by Coach driving. The evidence was that somewhere between 0.85% and 1.5% of Transit drivers drove for Coach. There was evidence before the Referee that at least four Coach drivers drove Transit routes between 2009 and July 31, 2010. The Transit Employees gave evidence that Coach dispatchers would sometimes approach Transit drivers and request that they take on Coach shifts, and that other drivers would cover Transit routes if necessary. As such, the Referee accepted that the dispatchers did not operate in "watertight compartments".

[21] The Referee also heard evidence about Tokmakjian's operations during the G20 Conference in Toronto, which took place in June 2010. The Transit Employees led evidence that, at that time, there was a sudden and greatly increased need for Coach drivers, and many Transit drivers drove for Coach for much or all of that pay period.

B. *Referee's analysis*

[22] The Referee introduced the "Decision" section of her analysis as follows:

> The parties have been raising the issue of constitutional jurisdiction between them for many years. It is unfortunate that the issue was left to be determined on an *ad hoc* basis, rather than being brought before the CIRB or the OLRB, either of which would have had more expertise in this complex area of the law. However, I must do my best to determine the proper constitutional jurisdiction of Transit, since if Transit is not within federal jurisdiction I have no authority to deal with the matter of severance pay, based on s. 167 of the *Canada Labour Code.*

[23] The Referee recognized that employment matters fall presumptively under provincial jurisdiction. However, she also relied heavily on the 1995 CLRB Decision, writing that "stability is an important value", and "once a determination is made that an employer is within federal jurisdiction, […] its status should remain constant unless and until it can be shown that there has been a substantive change in the business since the last jurisdictional ruling". The Referee did not, however, take the 2003 HRDC Decision into consideration, finding that it had been rendered for a specific purpose in a non-adversarial context, at a time when Coach and Transit were operating from separate locations.

[24] From this starting point, the Referee cited *Tessier Ltée v Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23 [*Tessier*] for the proposition that she had to first answer whether Coach and Transit were a "single undertaking" or "two separate undertakings". She then examined the evidence before her for commonalities and differences between the operations and "nature of the work" of the two divisions, and found:

> Based on my analysis of the facts overall, it seems that many of them could support either result. However, in my view there is a slight preponderance of factors indicating that there is a single undertaking rather than two separate undertakings.

[25] With respect to the jurisprudence before her, the Referee distinguished many of the cases provided to her by Tokmakjian because they dealt with "derivative" jurisdiction and not whether two operations were "one undertaking". She considered *Trentway-Wagar Inc*, 2007 CanLII 57371 (OLRB) [*Trentway-Wagar*] to be "most similar on its facts, and in the legal question being asked", and determined that "the degree of centralization versus autonomy" was "about the same" in *Trentway-Wagar* as in the case before her. The Referee disregarded the dissent in *Trentway-Wagar*, finding that it erroneously dealt with derivative jurisdiction.

[26] The Referee ultimately concluded that Transit and Coach were a "single undertaking" providing interprovincial transportation services, and that the Transit Employees were thus federally regulated for labour relations purposes.

[27] The Referee also noted that, if she were wrong and Transit and Coach were two undertakings, she would not have concluded that the Transit Employees fell under federal

jurisdiction under a "derivative" analysis. Her comments on this point, which amount to *obiter dicta* (i.e., incidental or extraneous remarks), were as follows:

> It is certainly easy to imagine how the two lines of business could be quite easily separated. The degree of interchange or cross-over between the two lines of business is not large, in the ordinary course of events. If the facts as they existed were sufficient to establish two undertakings, then I would also have to conclude that there was insufficient dependence or integration to lead to derivative federal jurisdiction applying to Transit.

III. Standard of Review

[28] Whether the Transit Employees are federally or provincially regulated is a constitutional question. The Federal Court of Appeal [FCA] recently confirmed in *Sawyer v Transcanada Pipeline Limited*, 2017 FCA 159 [*Sawyer*] that constitutional questions attract a correctness standard of review:

> 7 […] Constitutionality is one of the few issues that remain subject to correctness review. This has been the case since *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 58, [2008] 1 S.C.R. 190 [*Dunsmuir*] and remains so today: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 [*Edmonton East*].
>
> 8 The rationale underlying this principle is that the expertise of the Board is not in respect of legal analysis of the constitution: *Dunsmuir* at paras. 58-61; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 at para. 40, 156 D.L.R. (4th) 456 [*Westcoast Energy*]. This point is underscored by considering that the premise that underlies deference, the existence of a range of possible outcomes, recognizes that reasonable people may take different, but equally acceptable views on the same point: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471. Governance of the Canadian federation would not be well served by the application of deference, and its tolerance for divergent but

> equally sustainable outcomes, with respect to legislative jurisdiction.

[29] The FCA also applied a correctness standard for the constitutional questions at issue in both *Nishnawbe-Aski Police Service Board v Public Service Alliance of Canada*, 2015 FCA 211 [*Nishnawbe*] (at para 6) and *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada, Local 114) v Pacific Coach Lines Ltd*, 2012 FCA 329 [*PCL* (FCA)] (at para 18). The Supreme Court of Canada [SCC] refused to grant leave to appeal in both cases (2016 CarswellNat 962 (WL Can); 2013 CarswellNat 1865 (WL Can)).

[30] Accordingly, no deference is owed by this Court to the Referee's constitutional determination.

IV. Analysis

A. *The presumption of provincial jurisdiction over labour relations*

[31] Legislative power in Canada is shared by the federal and provincial governments (see Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Canada: Thomson Reuters, 2007) (loose-leaf 2016 supplement) ch 5.1 [Hogg]). The division of powers between the federal and provincial governments is set out in the *Constitution Act, 1867*. Generally speaking, the provincial legislatures are assigned broad powers over local matters, while the federal government has those powers which are better exercised at the national level (see *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53 at paras 29-30 [*Fastfrate*]).

[32] The Transit Employees only have rights to severance pay under the *Code* if the federal government had constitutional jurisdiction to regulate Transit's labour relations. I must therefore determine which level of government had jurisdiction over the Transit Employees.

[33] To begin with, the *Constitution Act, 1867* does not tell us whether "labour relations" are a federal or provincial matter; it does tell us, however, that the provinces have jurisdiction, under section 92(13), to regulate local "property" and "civil rights" matters. The courts have interpreted these powers to include labour and employment matters (*Tessier* at para 11).

[34] Although the provinces have jurisdiction over labour matters because of section 92(13), the federal government nonetheless has exceptional jurisdiction over labour matters of "federal" works and undertakings — i.e., operations that fall under federal jurisdiction (*NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45 at para 12 [*NIL/TU,O*]). In other words, where the federal government has constitutional authority over an enterprise, the federal government also has the power to regulate the labour relations of that enterprise (see *Tessier* at para 15, referring to *Reference re Industrial Relations and Disputes Investigation Act*, [1955] SCR 529 (SCC) [*Stevedores Reference*]). This is because an appropriate level of control over labour relations is needed to effectively manage an enterprise.

[35] The upshot of the *Constitution Act, 1867*'s division of powers is that the provinces have "presumptive" jurisdiction over labour relations under section 92(13) and the federal government has jurisdiction over labour relations only when necessary (*NIL/TU,O* at para 11). Federal jurisdiction over labour matters is the exception, not the rule. For federal jurisdiction to apply to

the labour relations of an undertaking, the provincial presumption must be rebutted (*Nishnawbe* at para 29).

[36] The Referee referenced the presumption of provincial jurisdiction over labour matters as follows:

> Although there is a presumption that employment is a matter of provincial regulation, once a determination is made that an employer is within federal jurisdiction, it seems to me that its status should remain constant unless and until it can be shown that there has been a substantive change in the business since the last jurisdictional ruling. Stability is an important value, and an organization's constitutional jurisdiction should not change back and forth easily or frequently, unless there is a compelling reason to do so.

[37] In this Application, Tokmakjian argues that the Referee erred by failing to start with the provincial presumption, instead beginning with a preference for "stability".

[38] I agree with Tokmakjian that it was indeed an error for the Referee to mention the provincial presumption, but then fail to apply it. This was similar to the error made in *Nishnawbe*, in which Justice Stratas criticized the CIRB for referring to the provincial presumption in its decision but failing to engage with it (at paras 29-33). Because the provincial presumption derives from the *Constitution Act, 1867*, decision-makers must remember that federal jurisdiction over labour matters is exceptional, and narrowly interpret the situations where provincial jurisdiction is "ousted" (*Fastfrate* at para 27; *NIL/TU,O* at para 11). OLRB Chair Bernard Fishbein, for instance, observed recently in a comprehensive constitutional analysis that "courts will not quickly displace the presumption of provincial jurisdiction over

labour relations" (*Ramkey Communications Inc*, 2017 CanLII 16933 (OLRB) at para 153 [*Ramkey*]).

[39] Also instructive is the dissent of Justice McLachlin (as she then was) in *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322 (SCC) [*Westcoast*], which has since garnered support (see *Tessier* at para 45). Justice McLachlin wrote that, where a federal power is exceptional, "it should be extended as far as required by the purpose that animates it, and no further" (*Westcoast* at para 116).

[40] Thus, where federal jurisdiction over a matter is the exception, not the rule, decision-makers must take that as the starting point — any alternative approach risks undermining the division of powers (see *Westcoast* at para 161, citing *United Transportation Union v Central Western Railway Corp*, [1990] 3 SCR 1112 (SCC) at 1146, 1990 CarswellNat 1029 (WL Can) at para 60 [*Central Western*]).

[41] The Transit Employees argue that the Referee assigned the 1995 CLRB Decision its correct significance and rely on *Fastfrate* for the proposition that consistency and predictability on constitutional questions is "essential" (*Fastfrate* at para 45).

[42] First, I am unpersuaded that the provincial presumption falls away merely because there has been a determination by a labour tribunal on the constitutional issue — especially where such a prior determination is cursory, and predates important developments in constitutional law. In this case, the 1995 CLRB Decision predated both *Westcoast* and *Tessier*, as well as appellate

jurisprudence that has interpreted those cases (including *Sawyer*, *Total Oilfield Rentals Limited Partnership v Canada (Attorney General)*, 2014 ABCA 250 [*Total Oilfield*], and *Actton Transport Ltd v British Columbia (Employment Standards)*, 2010 BCCA 272 [*Actton Transport*], which are all examined further below).

[43] Second, the SCC comments on constitutional "predictability" in *Fastfrate* do not support the proposition advanced by the Transit Employees. In *Fastfrate*, the SCC referenced "predictability" in endorsing an existing body of case law specific to Fastfrate's freight-forwarding business. This makes sense, because much of the jurisprudence in this area of law is industry-specific. But *Fastfrate* did not use "consistency" to displace the provincial jurisdictional presumption that flows from the division of powers set out in the *Constitution Act, 1867*. To the contrary, the SCC in *Fastfrate* gave full effect to the provincial presumption by interpreting the *Constitution Act, 1867* in a manner that saw federal jurisdiction over labour relations as "the exception, rather than the rule" (*Fastfrate* at para 44). The Transit Employees' reliance on *Fastfrate* for the principle of "consistency" in this context is therefore misplaced.

[44] The Transit Employees further argue that, notwithstanding the Referee's comments on "consistency", she nonetheless correctly conducted her own analysis and did not simply follow the 1995 CLRB Decision. In oral argument, counsel for the Transit Employees further suggested that the Referee looked at the facts as they existed in July 2010 and did not "look backward".

[45] Again, I disagree. The Referee found that the constitutional ruling in the 1995 CLRB Decision should "remain constant" absent a "compelling reason" and a "substantive

change" to Tokmakjian's business. Indeed, the Referee found that a "key factor" in her constitutional analysis was that the "same types of business had been carried out since the original certification decision" and that the "fundamental nature of the undertaking" was still the same as it had been at the time of the 1995 CLRB Decision. She went on to conclude that "an existing constitutional jurisdiction decision" should not be affected by changes in the "proportions" of a business' federal and provincial work, absent some other substantive change in the business' activities. As such, I cannot accept the Transit Employees' argument that the Referee did not "look backward".

[46] Moreover, and although I am satisfied that the Referee erred in departing from the provincial presumption, I note that the Referee's "consistency" rationale was itself inconsistent: she relied heavily on the 1995 CLRB Decision and placed no weight on the 2003 HRDC Decision. The parties to this litigation have switched their positions over the years with respect to which side of the constitutional divide they fell into, depending on what suited them at the time. Because of this, it was incumbent upon the Referee to examine Tokmakjian's operations as of July 2010, and not selectively rely on an early, cursory, and dated constitutional determination.

[47] In sum, I find that the Referee erroneously focused on "compelling" reasons to depart from the 1995 CLRB Decision, and that she did not engage with whether the Transit Employees had successfully rebutted the presumption of provincial jurisdiction over Transit's labour matters.

B. *Rebutting the provincial presumption: "direct" and "derivative" federal jurisdiction*

[48] The courts have spent the better part of the past century grappling with how to determine constitutional jurisdiction over labour relations. Having reviewed the jurisprudence, the one thing that is clear to me in this area of law is that it is unclear. Indeed, in *Ramkey* — a 229-paragraph decision — Chair Fishbein observed that the law in this area is a "sea of confusing and often contradictory jurisprudence" (at para 5). While I do not propose to go to the lengths Chair Fishbein did in his effort to navigate these treacherous waters, I will try to outline my view of what the law requires in a constitutional analysis of labour relations — at least with respect to transportation undertakings.

[49] As explained above at paragraphs [34] to [35], the federal government has exceptional jurisdiction over the labour relations of "federal" undertakings. Whether an undertaking is "federal" — and the provincial presumption therefore rebutted — depends on the nature of the undertaking's operations, assessed on the basis of the "normal and habitual activities of the business" and disregarding "exceptional or casual factors" (*NIL/TU,O* at para 14, excerpting from *Northern Telecom v Communications Workers*, [1980] 1 SCR 115 (SCC) at 132, 1979 CarswellNat 639F (WL Can) [*Northern Telecom 1*] at para 31). This is known as the "functional test" (*NIL/TU,O* at para 14).

[50] If the "functional test" is inconclusive, then the decision-maker must also consider whether provincial jurisdiction over the undertaking's labour relations would "impair the core of the federal head of power at issue" (*NIL/TU,O* at para 18).

[51] In its recent *Tessier* decision, the SCC clarified how the "functional inquiry" in fact contains two pathways through which the federal government may assert jurisdiction over an undertaking's labour relations (*Tessier* at paras 18-19).

[52] Under the first path, the federal government has jurisdiction over the labour relations of an undertaking that is itself "federal". Under the second path, the federal government has jurisdiction if the undertaking is not itself "federal", but is instead "integral" to another federal undertaking. *Tessier* labelled these two pathways as "direct" and "derivative" jurisdiction, respectively. The SCC explained that both pathways focus on the "essential operational nature" of the undertaking whose labour relations are at issue:

> 17 […]this Court therefore established that the federal government has jurisdiction to regulate employment in two circumstances: when the employment relates to a work, undertaking, or business within the legislative authority of Parliament; or when it is an integral part of a federally regulated undertaking, sometimes referred to as derivative jurisdiction. Dickson C.J. described these two forms of federal jurisdiction over labour relations as distinct but related in *United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112, at pp. 1124-25.
>
> 18 In the case of direct federal labour jurisdiction, we assess whether the work, business or undertaking's essential operational nature brings it within a federal head of power. In the case of derivative jurisdiction, we assess whether that essential operational nature renders the work integral to a federal undertaking. In either case, we determine which level of government has labour relations authority by assessing the work's <u>essential operational nature</u>.
>
> [Emphasis added]

[53] The portion of *Central Western*, referenced above in *Tessier*, reads as follows:

> There are two ways in which Central Western may be found to fall within federal jurisdiction and thus be subject to the *Canada Labour Code*. First, it may be seen as an interprovincial railway and therefore come under s. 92(10) (a) of the *Constitution Act, 1867* as a federal work or undertaking. Second, if the appellant can be properly viewed as integral to an existing federal work or undertaking it would be subject to federal jurisdiction under s. 92(10) (a). For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is itself an interprovincial work or undertaking. Under the latter, however, jurisdiction is dependent upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking
>
> [Emphasis in original]

[54] In a typical application of the functional test, the decision-maker will examine whether the constitutional character of an undertaking is itself federal, and, if it is not, the decision-maker may look at the relationship between that undertaking, and another federal undertaking.

[55] On occasion, the functional test is complicated by the fact that a single enterprise can carry on more than one "undertaking" in the relevant constitutional sense. For instance, in *Re Employees of the Canadian Pacific Railway in Empress Hotel (City)*, the Privy Council held that the appellant conducted two undertakings: a railway company and a hotel business, rather than a single railway undertaking ([1950] 1 DLR 721 (Judicial Committee of the Privy Council) at para 14, 1949 CarswellBC 115 (WL Can) at para 14). Where the number of undertakings is in dispute, the functional inquiry first requires that the decision-maker determine whether the operations form a "single" undertaking or not.

C. *Determining the number of undertakings*

[56] The federal power that concerns the Court on this Application is found in section 92(10)(a) of the *Constitution Act, 1867*, which provides that a "local" work or undertaking falls under provincial jurisdiction, unless it connects two provinces, or extends beyond the limits of a province, in which case the federal government has jurisdiction (see *Total Oilfield* at paras 34-41). Section 92(10)(a) has been interpreted to mean that the provincial governments have authority over intraprovincial transportation undertakings, while the federal government has jurisdiction over interprovincial and international transportation undertakings (*Total Oilfield* at para 39).

[57] Tokmakjian is a transportation business because it uses buses to transport people (*Total Oilfield* at para 43; *Fastfrate* at para 65). However, its transportation activities only fall under federal jurisdiction if those activities are interprovincial. A transportation undertaking is "interprovincial" for the purposes of section 92(10)(a), if it "continuously and regularly" crosses provincial borders, even if those interprovincial operations are only a small fraction of its overall transportation activities (*Tessier* at paras 51-52; *Total Oilfield* at paras 71, 74). The "continuous and regular" test therefore means that a single transportation undertaking with predominantly intraprovincial activities can still be federally regulated.

[58] The background provided in the two paragraphs above helps to explain why the question of whether there are one or more undertakings makes a great deal of difference when it comes to the constitutional character of transportation businesses.

[59] In this Application, Tokmakjian argues that Coach and Transit were two undertakings as of July 2010. If that was the case, then only Coach would be subject to federal jurisdiction under section 92(10)(a) and, by extension, only Coach employees would be governed by the *Code*, because only Coach's operations "regularly and continuously" crossed provincial borders.

[60] The Transit Employees assert, conversely, that Coach and Transit comprised one "single" transportation undertaking. Coach and Transit would then both be federally regulated because they constituted one undertaking whose operations "continuously and regularly" crossed provincial borders — even though cross-border trips were a small part of Coach's operations, and represented a diminishing portion of Tokmakjian's overall business after September 11, 2001.

[61] This type of "one undertaking or two" dispute was first considered in *Ontario (Attorney General) v Winner*, [1954] 4 DLR 657 (Judicial Committee of the Privy Council), 1954 CarswellNB 40 (WL Can) [*Winner*]. In that case, MacKenzie Coach Lines operated a bus service from Maine through New Brunswick to Nova Scotia, with some passengers getting on and off in New Brunswick. New Brunswick argued that it had the authority to regulate those trips that started and ended in the province.

[62] The Privy Council ruled that it might have accepted such an argument if there had been evidence that "Mr. Winner was engaged in two enterprises, one within the province and the other of a connecting nature" (*Winner* at para 50 (DLR), at para 50 (WL Can)). However, the Privy Council held that there was no evidence to support such a finding, writing that "[t]he same buses

carried both types of passenger along the same routes; the journeys may have been different, in that one was partly outside the province and the other wholly within, but it was the same undertaking which was engaged in both activities" (*Winner* at para 50 (DLR), at para 50 (WL Can)).

[63] In *Winner*, the Privy Council rejected the argument that a distinction could be drawn between the "essential" interprovincial and the "incidental" intraprovincial portions of the business, ultimately finding that:

> The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether; it is rather what is the undertaking which is in fact being carried on. Is there one undertaking, and as part of that one undertaking does the respondent carry passengers between two points both within the province, or are there two?
>
> [*Winner* at paras 51-52 (DLR), at paras 51-52 (WL Can)]

Winner held that the transportation undertaking was "in fact one and indivisible" and whether or not it might have been carried out differently was irrelevant (*Winner* at para 55 (DLR), at para 55 (WL Can)).

[64] The analysis in *Winner* was then relied upon by the Ontario Court of Appeal in *ATU, Local 279 v Ottawa-Carleton Regional Transit Commission*, 4 DLR (4th) 452 (ONCA), 1983 CarswellOnt 599 (WL Can) [*OC Transpo*]. In that case, OC Transpo operated primarily in the Ottawa-Carleton area of Ontario, but a small percentage of its operations consisted of bus routes crossing into Hull, Quebec.

[65] OC Transpo argued that it was a municipal transportation system subject to provincial jurisdiction because the Hull routes were very minor and non-essential to its operations and could be discarded without affecting OC Transpo's essential nature (*OC Transpo* at 458 (DLR)).

[66] The Court of Appeal, however, found that the analysis in *Winner* was "a complete answer to the submission that the bus routes to Hull could be severed from the operations of OC Transpo", holding that the Hull routes were an "integral and historical part" of the transportation undertaking (*OC Transpo* at 460 (DLR)). Therefore, because it was a single undertaking with interprovincial transportation services, OC Transpo fell under federal jurisdiction, even though its interprovincial routes were only a small fraction of its overall operations (*OC Transpo* at 458 (DLR)).

[67] At the hearing of this Application, counsel for the Transit Employees argued that *Winner* and *OC Transpo* were dispositive of the constitutional question. These cases, it was argued, set out the correct principles for determining whether a transportation business comprises one or more undertakings, and that these principles have since been applied and developed by various labour boards and decision-makers, including in *Charterways* at paragraphs 20 and 29, *Transit Windsor*, 1993 CanLII 7885 (OLRB) at paragraphs 9-10 [*Transit Windsor*], *1113666 Ontario Limited cob Deluxeway Bus Lines*, [1995] OLRD No 1603 (OLRB) at paragraph 14 [*Deluxeway*], *Supply Chain Express Inc*, 2001 CanLII 9134 (OLRB) at paragraph 44 [*Supply Chain*], *Trentway-Wagar* at paragraph 46, and *Q-Tek Tankers Ltd*, 2016 CarswellNat 4625 (WL Can) (Canada Adjudication) at paragraphs 18 and 38-43 [*Q-Tek*].

[68] The Transit Employees' counsel also submitted that these cases set out the relevant factual indicia for determining whether a single transportation undertaking exists, and that the Referee correctly considered those indicia.

[69] I do not agree that the constitutional question in this Application starts and ends with *Winner* and *OC Transpo* and the various labour decisions that followed. This is because it was not until 1999 in *Westcoast* — well after both *OC Transpo* and *Winner* were decided — that the SCC dealt squarely with the test for a "single undertaking". In *Westcoast*, the SCC considered whether federal or provincial jurisdiction applied to certain natural gas gathering pipelines and processing plants that were located entirely within British Columbia but fed natural gas to an interprovincial, mainline pipeline.

[70] Building on the test for constitutional jurisdiction set out in *Central Western*, the *Westcoast* majority determined that the gathering pipelines and processing plants would fall under federal jurisdiction only if they either (i) constituted a "single" federal undertaking with the mainline pipeline, or (ii) were "integral to" the mainline pipeline (*Westcoast* at paras 45-46). In other words, and using the language later adopted in *Tessier*, if a single undertaking was found, then the whole undertaking was "directly" federal because of the interprovincial character of the mainline pipeline. If the provincially-bounded facilities were a separate undertaking, they might still be found to be integral to the interprovincial pipeline, in which case they would have a "derivative" federal character.

[71] In determining whether the gathering pipelines, processing plants, and mainline pipeline were a "single" undertaking, the majority in *Westcoast* noted that a physical connection or common commercial ownership between the operations would not, without more, lead to a finding of a single undertaking (*Westcoast* at para 48). Rather, the SCC wrote that there had to be a more fundamental and substantive interrelationship:

> 49 In order for several operations to be considered a single federal undertaking for the purposes of s. 92(10) (a), they must be functionally integrated and subject to common management, control and direction. Professor Hogg states, at p. 22-10, that "[i]t is the degree to which the [various business] operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not". He adds, at p. 22-11, that the various operations will form a single undertaking if they are "actually operated in common as a single enterprise". In other words, common ownership must be coupled with functional integration and common management. A physical connection must be coupled with an operational connection. A close commercial relationship is insufficient. See *Central Western*, *supra*, at p. 1132.

[72] *Westcoast* also adopted the principle set out in *Winner* that "the manner in which the undertaking might have been structured or the manner in which other similar undertakings are carried on is irrelevant" to whether it is a "single" undertaking or not (at para 53).

[73] The FCA recently relied on *Westcoast* in *Sawyer*, a decision which I referred to above in the standard of review analysis. *Sawyer* held that the National Energy Board had incorrectly applied the "single undertaking" test set out in *Westcoast* by failing to focus on the concept of "functional integration", explaining that:

> 44 […] The test is whether the parts of the undertaking are functionally integrated and, if so, how they work together and for what purpose. Only when these criteria are taken into account can the [constitutional] nature of the undertaking be determined.

> […]
>
> 47 Put otherwise, the Board did not direct its mind to the nature of the enterprise or undertaking in issue. There was considerable evidence before the Board, none of which was in dispute, that the purpose of the PRGT was to move gas from the WCSB for export to international markets. The Board looked at where the pipeline was, and did not ask what it did.

[74] Because *Sawyer* was published after the hearing of this Application, I invited the parties to make submissions about *Sawyer*'s treatment of *Westcoast*, and about whether these cases were distinguishable. In their post-hearing submissions, the parties agreed that the test in *Westcoast* was indeed relevant to the determination of this Application.

[75] The Transit Employees submitted that the "single undertaking" test set out in *Westcoast*, and developed in *Sawyer*, was appropriate in the labour relations context, and noted that the concepts of common management, control, and direction were widely applied in labour adjudication.

[76] Tokmakjian pointed out that this test was used in the labour context in *Pacific Coach Lines Ltd*, 2012 CIRB 623 at paragraphs 65-70 [*PCL* (CIRB)], a labour board case which was put before the Referee, and which she considered in detail in her Decision.

[77] Of paramount note, the FCA subsequently upheld the CIRB's decision in *PCL* (FCA), writing that the CIRB had instructed itself correctly on the applicable law, applied the correct analytic framework, and correctly declined jurisdiction due to its constitutional analysis and conclusion (*PCL* (FCA) at paras 24-25).

[78] In this Court, the principles underlying *Westcoast* were also recently applied in *Berens River First Nation v Gibson-Peron*, 2015 FC 614, when Justice Strickland upheld an adjudicator's analysis on the basis that (i) direct federal jurisdiction requires an examination of an entity's essential operational nature, and (ii) "functional integration" must be considered as part of that inquiry (at para 90).

[79] The principles in *Westcoast* have also been applied by other labour tribunals when determining jurisdiction where a company performs multiple services (for instance, see *Rivtow Marine Ltd and Tiger Tugz Inc*, 1999 CIRB 30 at paras 19-23 and 26-29; *Seaspan International Ltd*, 2004 CIRB 267 at paras 47-48). Indeed, in *Trentway-Wagar*, which the Referee relied upon in her Decision, although the OLRB cited neither *Central Western* nor *Westcoast*, it nevertheless framed the issue of the number of undertakings in terms of the "functional integration" principle, writing: "is the Whitby transit work functionally integrated into a single, unified undertaking?" (at para 37). Similarly, in *Supply Chain*, which is relied upon by the Transit Employees in this Application, the OLRB referenced *Westcoast* and ultimately concluded: "[t]he emphasis of the examination of businesses by courts and labour boards has been on the functional integration of the operations" (at para 90).

[80] The other four labour decisions relied upon by the Transit Employees, and listed at paragraph [67] of these Reasons, do not cite *Westcoast*. However, *Transit Windsor*, *Q-Tek*, and *Deluxeway* found the entities at issue to be "integrated" (at paras 9, 18, and 14, respectively), while in *Charterways* the OLRB took a "functional and practical" view in determining the number of undertakings (at para 28).

[81] I would also make two final observations on *Westcoast*'s application in the labour relations context, in light of the SCC's other jurisprudence.

[82] First, *Westcoast* followed and developed the two-part test set out in *Central Western*, which was itself a labour relations case.

[83] Second, *Westcoast* was most recently summarized by the SCC in the labour relations case *Tessier* as an example of "direct" federal jurisdiction. The SCC noted that Westcoast had operated a single, "indivisible" undertaking in a federal field (*Tessier* at para 44). Indeed, *Tessier* implicitly confirmed that the "single undertaking" analysis is needed to properly perform the second-stage, derivative analysis; the SCC ruled that "if there is an indivisible, integrated operation, it should not be artificially divided for purposes of constitutional classification" (at para 55). The Court contrasted this situation with those in which a "functionally discrete unit" of an otherwise provincially-regulated entity performs integral services for a related federal undertaking (see *Tessier* at para 49, referring to *Northern Telecom v Communication Workers*, [1983] 1 SCR 733 (SCC) at 770-771, 1983 CarswellNat 535 (WL Can) at para 68 [*Northern Telecom 2*]).

[84] I am therefore satisfied that *Westcoast* governs when the number of undertakings is disputed in cases determining constitutional jurisdiction over labour relations, and will consider this Application in its light. In other words, I conclude that *Westcoast* sets out the test by which decision-makers determine whether an undertaking is "single", in the constitutional sense of being "indivisible" and "integrated" (see *Tessier* at para 55). Therefore, where a decision-maker

considers the issue of federal jurisdiction over labour relations, and the parties dispute whether the relevant entity's operations comprise one or more undertakings, the decision-maker must apply the "single undertaking" test set out in *Westcoast* as part of the first stage "direct" jurisdictional analysis.

D. *The relationship between the "single undertaking" test and "derivative" federal jurisdiction*

[85] The parties to this Application disagree over the distinction between the "single undertaking" test as a part of "direct" federal jurisdiction on the one hand, and the test for "derivative" federal jurisdiction on the other. The distinction matters in this Application for three reasons.

[86] First, the Referee distinguished analyses in the cases before her where they involved "derivative" considerations, including the dissent in *Trentway-Wagar*.

[87] Second, in her Decision, the Referee characterized only "derivative" jurisdiction as requiring "functional integration", rather than having that analysis also apply to the first stage "single undertaking" assessment.

[88] Third, and perhaps most significantly, while the Referee concluded that Coach and Transit were one undertaking, she also noted that she would not have held that derivative jurisdiction applied had they been two undertakings (as excerpted at paragraph [27] of these Reasons, in the Referee's *obiter* comments).

[89] Tokmakjian argues that the Referee erroneously characterized the relevant tests and that her *obiter* comments are inconsistent with a correct "direct" jurisdiction analysis. Tokmakjian submits that the Referee was required to consider such concepts as functional integration, dependency, and indivisibility as part of the first stage "single undertaking" test, and not defer these considerations to the "derivative" stage.

[90] The Transit Employees, on the other hand, asserted before the Referee that functional integration was irrelevant to the question of direct federal jurisdiction. They continue to argue in this Application that Tokmakjian fundamentally misunderstands and conflates the two stages of the functional test. They concede some irregularities in the Referee's phrasing, but essentially argue for function over form, submitting that the Referee's Decision is a thorough and careful analysis of all relevant indicia, and their correct constitutional implications. Finally, they argue that nothing turns on the Referee's *obiter* and in any event contest that it is inconsistent with the substance of the Referee's overall conclusion.

[91] I am not persuaded by the Transit Employees' arguments. The overlap between the "single undertaking" and "derivative jurisdiction" tests was addressed by Justice McLachlin in her dissenting opinion in *Westcoast*. Justice McLachlin found that the first-stage "single undertaking" test was duplicative of the second-stage "derivative" test, writing in reference to the majority decision:

> 108 My colleagues Justice Iacobucci and Justice Major seem to take a different view of the two branches of *Central Western*, *supra*. Essentially, they say that the two ways a work or undertaking can fall within the residual clause of s. 92(10) (a) are: (1) by being part of a single integrated interprovincial work or undertaking; and, (2) by being "integral" to an interprovincial work

> or undertaking (see para. 45). With respect, it seems to me these amount to the same thing. Under either alternative (1) or (2), the inquiry is whether the work or undertaking is part of an integrated scheme.
>
> [Emphasis added]

[92] Thus, according to Justice McLachlin's reasoning, the analysis of functional integration is "the same thing" at whichever point it is conducted, making the two parts of the test arguably duplicative of one another.

[93] This overlap between the "single undertaking" and "derivative analysis" tests was also noted by the British Columbia Court of Appeal [BCCA] in *Actton Transport*:

> [39] Whether an aspect of a business should be considered part of a single federal undertaking (the appellants' position in this case) or as an operation functionally integral to a federal undertaking, it all comes down to functional integration. This is what I understand the majority to have said in *Westcoast Energy Inc. v. Canada (National Energy Board)*:
>
> > [49] In order for several operations to be considered a single federal undertaking for the purposes of s. 92(10)(a), they must be functionally integrated and subject to common management, control and direction. Professor Hogg states, at p. 22-10, that "[i]t is the degree to which the [various business] operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not". He adds, at p. 22-11, that the various operations will form a single undertaking if they are "actually operated in common as a single enterprise". In other words, common ownership must be coupled with functional integration and common management. A physical connection must be coupled with an operational connection. A close commercial relationship is insufficient. See [*United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112] at p. 1132.

[Emphasis added]

[94] It is noteworthy that the SCC in *Tessier* referenced *Actton Transport* as a case where "certain workers were severable from their employer's overall operation" (at para 49). *Tessier* also endorsed the manner in which Justice McLachlin framed her dissenting reasons in *Westcoast*, noting that Justice McLachlin had "framed the case differently" than the majority, in a way that was "of particular assistance" to the SCC (*Tessier* at para 45).

[95] There is also significant terminological fluidity between first stage "direct" and second stage "derivative" analyses in the case law, which further supports Justice McLachlin's observations in *Westcoast* that the two tests "amount to the same thing", or that, as the BCCA put it in *Actton Transport*, "it all comes down to functional integration". In *Winner*, for instance, the Privy Council based its "single undertaking" conclusion on considerations of "indivisibility" (*Winner* at para 55), while *OC Transpo* found "one undertaking" because the Hull routes were an "integral" part of OC Transpo's operations (*OC Transpo* at para 14). In *Northern Telecom 1*, Justice Dickson, writing for the SCC, referred to a seminal SCC case involving stevedores as involving a finding of "one single and indivisible undertaking" (*Northern Telecom 1* at 134 (SCR), at para 36 (WL Can), citing the *Stevedores Reference*), while *Tessier* subsequently clarified that the *Stevedores Reference* has been "interpreted as a case of derivative jurisdiction" (*Tessier* at para 33).

[96] Indeed, going back to *Central Western*, Justice Dickson analysed in that case whether Central Western was directly a "federal" undertaking by virtue of its "operational connection" and "functional integration" with Canadian National Railway (at 1135-1136 (SCR), at paras 36-

37 (WL Can)), but then also considered "functional integration" alongside the primary factor of "dependency" in analysing whether Central Western was an "integral part of" Canadian National Railway (at 1136-1140, 1141-1142 (SCR), at paras 38-43, 49-51 (WL Can)).

[97] Notwithstanding the overlap in the development of the stage one "single undertaking" and stage two "derivative jurisdiction" tests, they both remain operative. *Sawyer* confirms that the *Westcoast*'s majority test is good law, and both parties to this Application agree.

[98] Indeed, no other test exists by which to determine whether an undertaking is "single", in the "integrated" and "indivisible" sense contemplated by *Tessier*. Thus this Court must determine how the stage one "single undertaking" and stage two "derivative" tests work together for the purposes of this Application, given the Referee's discussion of and findings under both stages.

(1) The “single undertaking” test

[99] In my view, the “single undertaking” test set out in *Westcoast* addresses situations where one organization contains discrete operations or divisions that are *prima facie* distinguishable from one another by some feature (for instance, by geographical scope or service type). Thus, the “single undertaking” test begins from the premise that mere corporate organization is insufficient to result in a finding of a “single enterprise” because a single company can carry on separate undertakings, which may fall under different jurisdictions.

[100] The jurisprudence is clear that a physical connection between two operations, which can happen in certain common ownership or close commercial relationships, is insufficient to establish a “single undertaking” (*Westcoast* at paras 48-49). Where two or more operations under a single corporate umbrella are analysed for their constitutional character, it is the actual, functional, practical, and factual reality that matters — not the “corporate costume” worn by the entity at issue (see *Sawyer* at paras 68-69; *Northern Telecom 1* at 133 (SCR), at para 32 (WL Can)).

[101] The “single undertaking” test therefore guards against the danger that a decision-maker will erroneously confuse a company’s particular commercial arrangement with the functional integration of its related operations required under constitutional law. As stated in *Sawyer*, “the commercial arrangement may inform the question of common control and management and hence functional integration, but it does not define the enterprise” and “it is only relevant insofar

as it informs the degree of functional integration" (*Sawyer* at paras 38 and 65, citing *Westcoast* at para 49).

[102] In *Sawyer*, the FCA provided further direction on how to properly apply the "single undertaking" test: the focus should not be on whether two related operations are functionally different, but on the degree and quality of functional integration — including how and for what purpose the operations "work together" (*Sawyer* at para 44). This is particularly important where one aspect of a business' operations is confined within a province. In such cases, it is an error to look at only where an operation is, and fail to ask what the operation does (*Sawyer* at paras 37, 46-47). Decision-makers must consider the nature of the project as a whole, and not take a myopic view of the geographical boundaries of the operation under scrutiny.

[103] As the SCC stated in *Westcoast*, the test for a "single undertaking" is fact-based and thus difficult to summarize comprehensively (at para 64). But certain questions can guide the analysis, such as considering the primary purpose of the operation under scrutiny; whether it is dedicated exclusively or even primarily to the operation of the core interprovincial undertaking; whether the goods or services provided by one operation are for the sole benefit of the other operation and/or its customers, or are generally available (*Westcoast* at paras 70, 54, and 65 respectively); and whether the operations are functionally interdependent, in the sense that one would not exist without the other (*Sawyer* at para 49).

(2) The “derivative jurisdiction” test

[104] Turning now to the “derivative” jurisdictional analysis, this second stage test addresses the varying factual situations where a particular undertaking is not itself federal in nature, but may be drawn into federal jurisdiction by virtue of its association with another federal undertaking. There may be no common management and control between the two undertakings, although that is not necessarily the case (see *Northern Telecom 2* at 771 (SCR), at para 70 (WL (Can)).

[105] *Tessier*’s lengthy review of the case law in this area again suggests that no comprehensive test is possible, but the SCC offered the following summary at paragraph 46:

> [T]his Court has consistently considered the relationship from the perspective both of the federal undertaking and of the work said to be integrally related, assessing the extent to which the effective performance of the federal undertaking was dependent on the services provided by the related operation, and how important those services were to the related work itself.

[106] At paragraph 55 of *Tessier*, the SCC also quoted with approval from paragraph 124 of Justice McLachlin’s *Westcoast* dissent:

> The local work or undertaking must, by virtue of its relationship to the inter-provincial work or undertaking, essentially function as part of the inter-provincial entity and lose its distinct character. In the context of an inter-provincial transportation or communication entity, to be functionally integrated, the local work or undertaking, viewed from the perspective of its normal day-to-day activities, must be of an inter-provincial nature — that is, be what might be referred to as an “interconnecting undertaking”... <u>If the dominant character of the local work or undertaking, viewed functionally, is something distinct from inter-provincial transportation or communication, it remains under provincial jurisdiction.</u>

[Emphasis added by the SCC in *Tessier*]

[107] Thus, although the test for derivative federal jurisdiction may focus on whether the subsidiary operation is "vital", "essential", or "integral" to the federal undertaking (*Tessier* at para 37, excerpting from *Northern Telecom 1* at 132 (SCR), at para 32 (WL Can)), functional integration matters to this second stage analysis just as much as it does in the first stage "single undertaking" analysis. In *Syndicat des débardeurs du Port de Québec (CUPE, Local 2614) v Société des arrimeurs de Québec Inc*, 2011 FCA 17, for instance, the FCA described derivative jurisdiction as engaging considerations of both dependency and integration:

> [48] These factors set out in Northern Telecom, 1980, are not intended to be applied in a strict or rigid manner; instead, the test should be flexible and attentive to the facts of each particular case. The test involves determining in a functional and practical manner whether the undertakings at issue depend on one another such as to be operationally integrated: *United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112, at pages 1139-40.
>
> [49] The degree of operational integration may vary, but it must be substantial and important, as well as vital, essential or fundamental…
>
> [Emphasis added]

[108] Both the "single undertaking" and the "derivative jurisdiction" tests are thus characterized by an "integration" inquiry, whether such integration flows, for instance, from a federal undertaking's dependency on a subsidiary operation, or from the functional interrelationship between two commonly-controlled operations.

[109] I note that, in the Decision under review, the Referee determined incorrectly that "functional integration" was relevant only to the "derivative jurisdiction" test and not the "single undertaking" test. My focus here has therefore been on the overlap between these tests, and in particular how "functional integration" operates in both analyses. However, I do not wish to be taken as finding that there are no differences at all between the "single undertaking" and "derivative jurisdiction" tests.

[110] One such distinction is the "directionality" of the dependence, or "who depends on whom". The case law states that for "derivative" jurisdiction to be established, the federal undertaking must be dependent upon the services of the subsidiary operation (*Tessier* at para 46), and not the other way around (*Fastfrate* at para 75). It is not clear to me, however, that such a rule exists in the "single undertaking" test (see *Westcoast* at para 54).

[111] There may well be other distinguishing features one could find in the vast jurisprudence that applies to other (non-transportation) industries. However, that is neither my focus nor task, which is rather to apply the correct legal test to the facts of the case before me.

E. *Application of the law to the facts of this case*

(1) Did the Referee apply the tests correctly?

[112] Having considered the applicable law, and notwithstanding the Referee's laudable effort to provide a thorough and careful analysis in her lengthy and comprehensive Decision, I conclude that she did not select or apply the correct constitutional tests. In fairness, I do not

believe that the relevant constitutional framework was articulated before her with as much clarity as it was in this Application.

[113] I have already found that the Referee did not give effect to the presumption of provincial jurisdiction over labour relations. I further find that, although the Referee correctly identified that her first task was to determine whether one or more undertakings existed, she did not conduct her analysis with reference to the constitutional principles set out in *Westcoast*, which were in the materials before her, and ought to have guided her analysis.

[114] I find that the Referee focused instead on the degree of "centralization" and effectively directed herself not to consider "functional integration" unless a derivative analysis arose. Although it was not necessarily an error for the Referee to distinguish lines of reasoning in other labour adjudications which dealt with derivative analyses, I am persuaded that the Referee did so because she misunderstood the role that "functional integration" plays in both direct and derivative jurisdiction, as is further demonstrated in her *obiter* comments excerpted at paragraph [27] of these Reasons.

[115] The Referee's *obiter* comments were in addition to her finding that while many facts could support "either result", there was a "slight preponderance" indicating that Coach and Transit were a "single" undertaking, as excerpted at paragraph [24] of these Reasons. This reference to merely a "slight preponderance" of facts in favour of a "single" undertaking is also significant: in my view, a "single" undertaking cannot be found on such a low standard. Such an outcome would not be consistent with the exceptional quality of federal jurisdiction over labour

relations, nor would it be in accordance with the concepts that animate both the "single undertaking" test and the "derivative" jurisdiction test, which suggest that a substantial degree of interrelationship is required. It is important to distinguish the "functional integration" inquiry into jurisdiction over labour relations, from the issue of whether a business is an interprovincial transportation undertaking: it is only the latter where even a *de minimus* amount of interprovincial transport results in a finding that the enterprise is a "federal" undertaking under the *Constitution Act, 1867* (see *Consumers' Gas Co v Canada (National Energy Board)* (1996), 195 NR 150 (FCA) at para 10, 1996 CarswellNat 335 (WL Can) at para 10, cited in *Tessier* at para 52).

[116] However, an adjudicator's errors in the constitutional analysis do not automatically mean that an incorrect decision has been reached (*Nishnawbe* at para 46). Indeed, the Transit Employees argued in their post-hearing submissions that the Referee's analysis was in substance consistent with both *Westcoast* and *Sawyer*, such that any technical irregularities in her statements of the law were inconsequential.

[117] It remains, then, for this Court to determine the constitutional question on this Application. Given that the parties agree on the applicable law and that the evidence before me is largely documentary, undisputed, and summarized by the Referee in her Decision, I see no reason not to undertake the analysis: to send this matter back for readjudication would further and unnecessarily prolong a dispute that has been ongoing for nearly eight years since the Transit Employees moved to a different employer. To require another hearing, given the largely undisputed factual findings, would not serve the interests of the parties or the justice system. As

Justice Karakatsanis wrote in *Hryniak v Mauldin*, 2014 SCC 7 at paragraph 25, "[p]rompt judicial resolution of legal disputes allows individuals to get on with their lives."

[118] Where the essential facts have been determined or are not in dispute, this Court has the ability — and, in my view, the responsibility — to answer the central question of whether the Applicant is federally or provincially regulated (*Nishwabe* at para 46; *TurnAround Couriers Inc v Canadian Union of Postal Workers*, 2012 FCA 36; *Syndicat des agents de sécurité Garda, Section CPI-CSN v Garda Canada Security Corporation*, 2011 FCA 302 [*Garda*]; *Native Child and Family Services of Toronto v Communication, Energy and Paper workers Union of Canada*, 2008 FCA 338, aff'd 2010 SCC 46; *Fox Lake Cree Nation v Anderson*, 2013 FC 1276). Further, at paragraph 29 of *Garda*, Justice Mainville held that deference is owed to an adjudicator's underlying factual findings if they can be separated from the constitutional analysis, as they can be in this Application.

(2) Are the Transit Employees federally or provincially regulated?

[119] I begin with the presumption that both Coach's and Transit's labour relations are provincially regulated (*NIL/TU,O* at para 11). The only relevant federal power in this Application is section 92(10)(a) of the *Constitutional Act, 1867*, through which the federal government has jurisdiction over interprovincial transportation undertakings. It is undisputed that, as of July 2010, Tokmakjian was a transportation business. Coach's operations regularly and continuously crossed provincial borders. Therefore Coach was an interprovincial undertaking within the meaning of section 92(10)(a). This means that it was a "federal"

undertaking for the purposes of the functional test, and the provincial presumption is rebutted with respect to Coach's labour relations at that time.

[120] On its face, Transit's operations, by contrast, were intraprovincial: there is no evidence before me that could support a finding that Transit drivers or buses regularly and continuously crossed provincial borders. Therefore, the only way that Transit's labour relations could fall under federal jurisdiction would be by virtue of its relationship with Coach, an interprovincial transportation undertaking. To rebut the provincial presumption, I must find that Transit was a "federal" undertaking either because it was (i) a "single" undertaking with Coach (direct jurisdiction), or (ii) "integral" to Coach (derivative jurisdiction). Otherwise, the provincial presumption over Transit's labour relations prevails.

[121] To find a "single" undertaking, and thus that Transit was "directly" a federal undertaking, I must find that Transit and Coach were "functionally integrated" and subject to "common management, control and direction" (*Westcoast* at para 65).

[122] To find "derivative" federal jurisdiction, I must find that Transit's "essential operational nature" rendered it "integral" to Coach by assessing the extent to which Coach's effective performance depended on Transit's services, and how important those services were to Transit itself (*Tessier* at paras 18 and 46).

[123] These analyses speak to the two-stage "functional test" and raise overlapping considerations of integration. I must focus on the "normal and habitual activities of the business"

and disregard “exceptional or casual factors” (*NIL/TU,O* at para 14). Because in this Application both the “direct” and “derivative” tests turn on the relationship between Coach and Transit, I will holistically consider both analyses.

[124] I am not persuaded by Tokmakjian’s argument that the Transit Employees’ submissions before the OLRB in 2010 are corroborative of Tokmakjian’s position on this Application. I do not believe that any of the prior labour board applications are of much assistance, either because they were never adjudicated or because they were decided long ago, in a cursory manner, and without reference to the governing legal principles at the time. Those principles have evolved, as has Tokmakjian. In making this finding, however, I do not foreclose the possibility that prior labour adjudications may assist other decision-makers in determining whether a given undertaking is “federal”, and the provincial presumption is therefore rebutted.

[125] At the relevant time, Coach performed charter services and Transit performed municipal services. I do not find that Transit and Coach worked together towards any purpose (*Sawyer* at para 44) — except if that purpose was “bus transportation”, which in the circumstances of this case is both too broad to be meaningful, and too unresponsive to Tokmakjian’s operational realities.

[126] The Transit Employees submit, in reliance on *Sawyer*, that Transit’s municipal activities were contractual and therefore a mere business or commercial arrangement ancillary to its integrated nature. This argument is unpersuasive, because I must consider how Transit and Coach actually operated (*Sawyer* at para 38), not how they “could have” operated if differently

organized (*Westcoast* at para 53). The fact that Transit's operations in York Region arose from a contract does not assist in this analysis. And as an aside, the fact that upon Tokmakjian's loss of the York Region contract, the Transit Employees were terminated and immediately re-hired by Veolia, undercuts the Transit Employees' submission on this point.

[127] I do not find that anything turns on the use of shared facilities, because a physical connection is insufficient to establish a single undertaking (*Westcoast* at para 48). According to the testimony before the Referee, Coach and Transit operated out of a single physical location as a matter of business convenience only, since Coach operations dwindled after September 11, 2001 and did not justify a separate facility. I do not find that the use of a single structure facilitated or furthered any common, integrative purpose. The same can be said for shared use of breakrooms, washrooms, and the parking lot.

[128] Similarly, I find that many factors relied upon by the Referee indicated only business convenience. For instance, the Referee found it significant that Transit drivers who drove Coach were paid for both types of work on a single paycheque and inferred, from the lack of financial evidence before her, that Tokmakjian took a "single pot" approach to finances. Indeed, the Referee found financial separation to be a "key factor" in her analysis, writing that, without evidence that Coach and Transit's financial details were separated, she "could not" conclude that "two distinct businesses or enterprises [were] being run by Tokmakjian".

[129] With these findings in mind, I do not agree with the Transit Employees' post-hearing submissions that the Referee's analysis was in substance consistent with *Sawyer*, which

specifically instructs that "commercial and billing arrangements" are "tangential" factors (*Sawyer* at para 38).

[130] Unlike the Referee, I do not find it helpful to characterize Tokmakjian's contract with York Region as "a repeating and very large charter contract". Transit and Coach each had their own dispatch systems, drivers, and equipment. At a practical, functional, and factual level, these differences responded to, and thus indicated, the different purposes each division served — one, a charter bus service providing interprovincial travel; the other, a municipal bus service that only had routes in Ontario.

[131] These different purposes were further reflected in differences in payment (Coach drivers were paid per trip, Transit drivers per hour) and separate training. To the extent that there was overlap in the training received by Transit and Coach drivers, the evidence indicates that it was only with respect to the narrow matter of customer service, and not training drivers to perform their primary function.

[132] I do not find that Transit supported or performed its work for Coach, whether entirely or at all, in the manner envisioned by *Westcoast*. I further do not find that Coach's effective performance depended upon Transit in any way, whether for the supply of employees or use of equipment or other services, as stipulated in *Tessier*. To the contrary, the Referee held that Coach and Transit had "different pools" of drivers, which were not treated as interchangeable, and that driver intermingling was neither frequent nor widespread. I also note that Tokmakjian's evidence was that such intermingling was voluntary and not dictated by Tokmakjian through formal

channels. In that respect, it is not the quantum of cross-over but its nature that is significant: Tokmakjian did not call upon Transit employees to drive Coach, except in the exceptional circumstance of the G20 Conference, which I must not take into account given its unprecedented and therefore exceptional occurrence in Ontario (*NIL/TU,O* at para 14). Indeed, the most significant factual dispute before the Referee centred on whether 0.85% or 1.5% of Transit drivers drove for Coach — a negligible percentage under either statistic. Again, any Transit driving done for Coach was both voluntary and minimal.

[133] The Transit Employees have encouraged me to focus on the "control" aspect of the *Westcoast* "single undertaking" test, suggesting that Tokmakjian's high-level control over Coach and Transit superseded differences in management at the divisional level.

[134] I do not find that any such high-level control was used in furtherance of a common, integrative purpose, as in Sawyer. Tokmakjian's evidence was that driver cross-over was extremely limited, and purely voluntary. In this regard, the Referee accepted that Tokmakjian did not rigorously record driver cross-over, either because such cross-over "did not matter" or because it was "done casually".

[135] Furthermore, contrary to the Transit Employee's position on common control, the record shows that Transit was too large to be managed by the same individuals as Coach; by July 2010, Tokmakjian had outgrown a system of centralized management. I do not find that there was a meaningful degree of "common management or control" over the two divisions: managers largely had control over their own employees, including hiring and firing, and these processes

necessarily worked differently, since Transit employees fell under the terms of a collective agreement, while Coach employees and contractors were not unionized.

[136] Considering all these facts, which are either undisputed or flow from the Referee's findings to which this Court owes deference, I conclude that Transit was neither a "single" undertaking with Coach, nor "integral" to its operations, and that it was therefore not "federal" for the purposes of rebutting the presumption of provincial jurisdiction over its labour relations under either a "direct" or a "derivative" analysis.

[137] I have made my determination that Coach and Transit were, at the material time, not functionally integrated, by focusing on what Coach and Transit did, not where they were (*Sawyer* at para 47): indeed, what Coach and Transit did defined the geographical scope of their operations, and not the other way around. I have considered indicia of integration, not difference (*Sawyer* at para 44), and the operations each division actually performed (*Sawyer* at para 38, citing *Fastfrate* at para 76), while disregarding matters of mere corporate or commercial convenience (*Westcoast* at para 66), all without regard to exceptional or casual factors or how Tokmakjian "could" have operated if differently organized (*NIL/TU,O* at para 14; *Westcoast* at para 53). The provincial presumption has not been rebutted.

[138] As this analysis is conclusive, there is no need for me to consider whether provincial regulation of Transit would impair the "core" of a federal head of power (*Nishnawbe* at para 72).

[139] This Application for judicial review is accordingly granted, and the Decision set aside. As Transit is not within federal jurisdiction, but rather falls under provincial regulation, the Referee has no authority to deal with the matter of severance pay based on section 167 of the *Code.*

V. Costs

[140] At the hearing of this Application, the parties agreed that costs would go to the successful party. Accordingly, Tokmakjian is entitled to its costs against the Transit Employees.

JUDGMENT in T-1110-15

THIS COURT'S JUDGMENT is that

1. The Application is allowed;

2. The decision of the Referee dated June 1, 2015, is set aside because the Respondents are not governed by the *Canada Labour Code*, RSC 1985, c L-2; and

3. Costs are awarded to the Applicant.

"Alan S. Diner"
Judge

Schedule "A"
List of Employees (Respondents), that are complainants in file numbers:
YM2727-3244, YM2727-3308 and YM2727-3309

Vella Sam
Schembri Mike
Van Bebber Andreas
Passaro Rosa
Gosney David
Civichino Frank
Stoltenhoff Vince
Walker Noel
Ash Chris
Kumar Sarita
Quinche Liberta
Castro John
Castro Leopoldina
McKenzie Hamlet
Arasakula Jalan
Rowsell Bruce
Khan Zahid
Santarita Alda
Annamalai Vijay
Rabinovich Manuel
Walji Nazim
Zamora Blanca
Lue Gregory
Singh Kerlaminar
Desai Abdul
Thacius Abraham
Amirthalingam Arunan
Mahadeo Elena
Rajenthram Siva
Selvachandiran Tharmarajah
Smart Stanford
Gomes Barry
Singh Amar
Kanapathy Devan
Clark Sandra
Thavarajah Kiru
Damji Shaffin
Kandiah Nesarajah
Nadarajah Jeeva
Atbay Abdul
Drummond Michael
Li Sue

Giannatassio Gloria
Natt Kamaljit
Ricketts Hyacinth
Tung Qunicy
Karnis Laszlo
Terrett Judith
Mohanapalan Mark
Bollers Andrea
Newman Tim
Sivakkolunthu Nagules
Rose Bernard
McDonald Christine
Nischal Lalit
Kostukovsky Alex
Chorowiec Walter
Leung William
Shortell Scott
Perera Atula (Len)
Medeiros Fernandina
Dutra Manuel
Pararasasegaram S
Bukhari Suraya
Achorn Ed
Markandu Thana
Arasakulasingam Sutha
Lal Prem
Navarro Windsor
Wu Kwok
Lee Ronald
Moushi Samira
Lewis Miranda
Hainsworth Steve
Ponnambalan Sureshkumar
Hui Thomas
Vincent Aneeta
Packeyarajah Nanthacumaar
Forutan Fatemeh
Singh Devinder
Hamilton Winston
Rajakulasooriyar Mylvaganam
Akhlaghi Ardeshir
Kelly Sue
Guzman Rene
Vallipuranathan Kandiah
Nicoletti Franco
Lingaratnam Kumar

Subramaniam Matheswaran
Rajcoomar Muneshwar
Thanabalasingham Kulasingham
Samson Yonas
McKay Laura
Datta Sanjay
Bouffard Maxime
Raveendran Thambapillai
Tandel Abdolkarim
Cheema Narinder
Fu Eric
Mao Hau-Shing
Muir Frank
Rudhra Satish
Au Thomas
Ursini Tony
Arunasalam Ariyaratnam
Bakharev Olga
Kandiah Satchithanantham
Poliyekudiyil Jose Paul
Selvarajah Selvendra
Sivapathan Piranavan
Vinayagamurthy Saishankar
Vyramuthu Sutharsan
Edjiu Atour
Robet Alexander
Shakoor Amtul
Ahmed Ashfaq
Ladha Mirza
Karthigesu Poopathirajah
Huo Jinian
Mailvaganam Balasingham
Ahmed Mehmood
Mighty Angela
Phangura Mandeep
Jeyaseelan Thambiayah
Nithiyanandan Vadivel
Pathmanathan Sivanathan
Poologanathan Subramaniam
Tchirkov Anna
Zatulovsky Igor
Kaplan Tatiana
Tharmalingam Balachandran
Tynes-Constantine Sharon
Jegatheswaran Vimal
Thiagarajah Kandiah

Manuel Aloysius
Arumaithurai Thayaparan
Markandu Selvakumaran
Jegatheeswaran Ramesh
Rai Ranjit
Sharma Raman
Rana Muhammad
Ramanathan Ratnakumar
Bdwal Ajit
Mohanaraj Arulampalam
Annamalai Vasanthakumar
Arumugam Sivanathan
Kats Igor
Prabhaharan Kumaraguru
Chan Sui-Fun
Karthigesu Sivarojiny
Sahota Jasmeet
Shanmugathas Kokulan
Soliba Ali
Velautham Sasikumar
Anthonipillai Lawrence
Ganeshalingam Narmilan
Cromwell Marlene
Kamalathasan Rajaratnam
Sandirasegaram Karalasingam
Sundaralingam Sathiyan
Varithamby Thevarajan
Mai Thomas
Alagaiah Gnanaswaran
Duncan Floyd
Palany Prabakaran
Subramaniam Srirengan
Thampipilai Vigneswaran
Bai Jian
Jeyanathan Sellathurai
Luk Kwun
McIntyre Kevin
Sambalis Vassilios
Vekneswaran Cinnadurai
Kalirasa Pathmajeyalan
Kandiah Ganesarajah
Pararajasingam Elango
Allman Faig
Derhovagimian Zaghkanouch
Kandiah Selvarajah
Subramaniam Vishnukumar

Cresswell Ronald
Luis Agostini
Antonio Pacheco
Gowriji Ganesharatnam
Edgar Montenegro
James Nickerson
Kenneth Edgar
Eddie Chen
Ahmed Abdul
Bassi Rupinder
Cestra Alberta
Kumar Shawn
Lama Gennaro
Libab Tesfa
Lynch Alan
Millard Kim
Mitkowski Mile
Mohammed Jameel
Perpelista Victoria
Prestanizzi Joseph
Rae Teresa
Ursini Tony
Senthilkumar Velucchamy
Dominique Oronos

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1110-15
STYLE OF CAUSE:	TOKMAKJIAN INC v EMPLOYEES LISTED IN SCHEDULE "A", ED ACHORN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 13, 2017
JUDGMENT AND REASONS:	DINER J.
DATED:	NOVEMBER 22, 2017

APPEARANCES:

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Simon Blackstone Karen Ensslen	FOR THE RESPONDENTS

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